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In the Supreme Court of the United States

BRISTOL-MYERS SQUIBB COMPANY

v.

SUPERIOR COURT OF CALIFORNIA FOR THE COUNTY OF SAN FRANCISCO, ET AL.,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

BRIEF FOR REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND TEXAS ASSOCIATION OF BROADCASTERS AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit associations that support and advocate for broadcasters and publishers in the United States and Mexico on issues relating to freedom of speech and the press:

- The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.
- The Texas Association of Broadcasters ("TAB") is a non-profit organization that represents more than 1,200 free, over-the-air television and radio broadcast stations licensed by the Federal Communications Commission to serve communities throughout Texas. Founded in 1951, TAB advocates on the industry's behalf before State and Federal policymakers on issues ranging from Open Government and media law to various regulatory matters. TAB also provides numerous direct services to member stations, including the publication of guide-

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amici curiae*, their members, and their counsel made any monetary contribution to this brief's preparation and submission. The parties consented to the filing of this brief.

books on legal issues involving newsrooms, advertising and regulatory compliance.

Amici share Petitioner's interest in clear and predictable standards for determining personal jurisdiction. In libel and privacy cases, plaintiffs frequently attempt to hale broadcasters and publishers into jurisdictions that have no connection with the reporting being challenged. In such cases, the specific jurisdiction analysis often turns on the "relatedness" of other forum contacts, such as the defendant's general marketing and promotional efforts.

Amici and their members support an appropriately rigorous "relatedness" standard that requires a causal connection between forum contacts and a plaintiff's claims. *See* Brief of Texas Association of Broadcasters, Reporters Committee for Freedom of the Press, National Chamber of the Industry of Radio and Television in Mexico, and Independent Radio Association of Mexico as *Amici Curiae* in Support of the Petitioners in *TV Azteca, S.A.B. de C.V. v. Ruiz*, No. 16-481 (filed Nov. 14, 2016). They respectfully submit this brief to show how the Court's resolution of the personal jurisdiction issue in this case may impact the ability of broadcasters and publishers to gather and report the news.

INTRODUCTION AND SUMMARY OF ARGUMENT

For decades, the dual principles of fair warning and predictability have been at the core of this Court's personal jurisdiction jurisprudence. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 287 (1980). The Court has consistently favored

clear jurisdictional standards that permit defendants "'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014) (quoting *Burger King*, 471 U.S. at 472). This jurisdictional predictability "is valuable to corporations making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). When companies know where they may be sued, they can identify the laws that will govern their conduct and ensure compliance with those laws.

In cases involving news reporting on matters of public concern, a defendant's interest in jurisdictional predictability is not merely commercial. Libel, privacy, and other related claims are often governed by state laws that may differ materially across jurisdictions. In light of these varying standards, broadcasters and other publishers need to know, with as much certainty as possible, which jurisdiction's laws will likely govern their newsgathering and reporting activities. Uncertainty breeds self-censorship, as publishers may feel compelled to conform their activities to the legal standards of jurisdictions that provide the least protection for free speech.

The analysis of the California Supreme Court in this case, like that of the Texas Supreme Court in the pending *TV Azteca* case, threatens such a chilling effect. The California Supreme Court's decision employs an amorphous "substantial connection" test that requires no but-for or proximate causal nexus between a plaintiff's claims and a defendant's forum contacts. *See Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 377 P.3d 874, 885 (Cal. 2016). Similar-

ly, the Texas Supreme Court's decision in *TV Azteca* eschews this Court's "focal point" test from *Calder v. Jones*, 465 U.S. 783 (1984), and rejects the majority causation approach for determining the "arises out of or relates to" element of specific jurisdiction.

If left uncorrected, these murky standards will undermine the jurisdictional predictability on which the news media relies to investigate and report vigorously on matters of public concern. This detrimental impact will intensify as current industry trends continue. Facing the erosion of traditional revenue sources, broadcasters and publishers are embracing diversified business models that include a variety of products, platforms, and services unrelated to any specific reporting. Many broadcasters and publishers produce concerts, conferences, and other special events for local communities, sell branded merchandise, operate e-commerce businesses, and design digital products and tech solutions for other companies. These new revenue streams make it possible for them to continue investing in their journalism operations, which are often more vital to the public interest than to the corporate balance sheet. But broad, unmoored jurisdictional analyses like those of the California and Texas Supreme Courts threaten to subject broadcasters and publishers to near-universal jurisdiction based on such general business and promotional activities. At a minimum, the decisions leave broadcasters and publishers unable to identify which of these activities could give rise to specific jurisdiction.

Jurisdictional unpredictability is not the only problem created by these decisions. Under the Texas Supreme Court's decision, for example, a Mexican broadcaster and a Mexican journalist have been

haled into U.S. court in a libel suit filed by Mexican citizens over reporting on events that transpired predominantly in Mexico and entirely outside the United States. This unreasonable exercise of jurisdiction threatens to spark reciprocal, retaliatory measures against U.S. broadcasters and publishers by foreign jurisdictions that lack First Amendment-style speech protections.

Although the facts of this case do not directly implicate the same international concerns, the California Supreme Court's analysis could certainly lead to the same result. Thus, affirming the California Supreme Court's jurisdictional analysis would exacerbate the problems of international comity and reciprocity exemplified by the Texas Supreme Court's decision.

I. Jurisdictional Standards for Determining the "Relatedness" of Forum Contacts Are Increasingly Relevant to Broadcasters and Publishers.

It has been three decades since the Court last decided a personal jurisdiction issue in a libel case involving the media. *See Calder*, 465 U.S. at 791; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984). Notably, both *Calder* and *Keeton* involved print distribution. The mechanics of print distribution—of sending physical copies of a publication to subscribers and retailers pursuant to contractual agreements—differ dramatically from the distribution of broadcast and online content. These differences raise important jurisdictional concerns, as broadcasters and publishers now find themselves distributing content across jurisdictional boundaries with the click of a button. The "signal spillover" at issue in *TV Azteca*

illustrates these concerns, which are made increasingly relevant with internet and social media distribution of content. Moreover, recent economic trends have spurred broadcasters and publishers to expand their business models well beyond content distribution, offering goods and services unrelated to any specific reporting and raising questions of how such contacts should play in the jurisdictional analysis. Thus, even though this case does not involve libel or privacy claims, the Court's decision and the "relatedness" standard it adopts will broadly impact broadcasters and publishers.

A. The "signal spillover" seen in *TV Azteca* affects numerous major media markets across the country.

The jurisdictional issues presented in *TV Azteca* are, in large part, the result of a phenomenon called "signal spillover," which affects broadcasters near state or national borders. Broadcast signals cannot be aimed in a specific direction or kept away from a specific state or country without violating the provisions of the licenses granted by the Federal Communications Commission. *See generally* Andrew L. Stoler, *The Border Broadcasting Dispute: a Unique Case Under Section 301*, 6 MD. J. INT'L L. 39, 40-41 (1980). Thus, broadcasters operating in border regions are unable to prevent their content from "spilling over" jurisdictional lines. This phenomenon is not limited to television broadcasters; AM and FM radio broadcasters also experience signal spillover.

Numerous major media markets in the United States are affected by signal spillover. AM radio stations hundreds of miles from the border in San Antonio, Austin, and Houston can be heard in northern

Mexico. Similarly, listeners in Texas can receive broadcasts originating from deep in Mexico. For example, the South Texas community of McAllen receives radio signals from sixty-two different stations, more than half of which are based in Mexico. Border cities like San Diego and El Paso also receive almost as many transmissions from Mexico as from the United States. And communities located near the northern border of the United States, such as Seattle and Detroit, receive stations broadcasting from Canada.

Signal spillover across state borders is even more prevalent. Nearly every state has media markets served by broadcasters from bordering states. For example, Boston-based stations transmit into Rhode Island, Connecticut, and New Hampshire. The New York television and radio markets include parts of New Jersey and Connecticut. Broadcasts from Atlanta stations reach Tennessee. Phoenix broadcasters reach California, just as San Diego broadcasters reach Arizona. And Detroit stations, which reach Canada, also send signals into Ohio. This signal spillover affects numerous major media markets and millions of viewers and listeners.

B. Unclear personal jurisdiction standards also affect all broadcasters and publishers that distribute content online.

Broadcasters in border areas are not the only media affected by cross-jurisdictional content distribution. Indeed, the *TV Azteca* court noted the "similarities" between broadcast signals that cross borders and online content that is frequently accessible worldwide. 490 S.W.3d at 44 n.8. Moreover, it is impossible to distinguish between "online" and other

types of publishers. *Cf. Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014) (describing technology that involved "broadcast television programming over the Internet, virtually as the programming is being broadcast"). Today, virtually all publishers are online publishers. This is certainly true for broadcasters, nearly all of whom also publish online. Television and news radio stations publish reports on their websites, along with additional content such as extended interviews with sources, key documents, or timely updates to on-air reports. They also stream live video—sometimes the same video that is being simultaneously broadcast over the air.

The distinction between print and online media has also long since collapsed. For years, newspapers and magazines have published content through their websites. Like broadcasters, they also publish news and commentary through Twitter and through partnerships with Facebook and Snapchat. *See, e.g.*, Steven Perlberg & Deepa Seetharaman, *Facebook Signs Deals With Media Companies, Celebrities for Facebook Live*, THE WALL STREET JOURNAL (June 22, 2016, 9:44 AM), https://goo.gl/M9Cyd5 ("[Facebook's] partners include established media outfits like CNN and the New York Times [and] digital publishers like Vox Media, Tastemade, Mashable and the Huffington Post[.]"). Many broadcasters and publishers even offer content through their own smartphone and tablet apps. *See, e.g.*, Kara Bloomgarden-Smoke, *No Escape From 'The New Yorker': How the proudest and stodgiest of legacy publications transformed into a multimedia juggernaut*, OBSERVER (Jan. 27, 2016, 1:46 PM), https://goo.gl/dWXH5l (print magazine publisher now also offering a podcast, web-exclusive content,

and its own television series available through Amazon.com).

In this multi-platform environment, the impact of a personal jurisdiction standard that does not require a sufficient causal nexus between suit-related conduct and the forum state is not limited to broadcasters. Jurisdictional standards that purport to apply only to one platform (for example, over-the-air broadcasts or magazine subscriptions) are unworkable and out-of-step with the reality of modern media. Decisions in the products liability context, as in this case, and in the broadcast context, as in *TV Azteca*, cannot be ignored by online publishers. And because all broadcasters and publishers are online publishers, decisions applying unpredictable personal jurisdiction standards affect them all.

C. Broadcasters and publishers are increasingly engaging in activities unrelated to any specific reporting, thus raising questions about the "relatedness" of such contacts.

The broad impact of the Court's decision in this case will be magnified as libel and privacy plaintiffs attempt to base specific jurisdiction on contacts by broadcasters and publishers that have no causal connection to the content giving rise to the plaintiffs' claims. For example, in *TV Azteca*, after holding that specific jurisdiction could not be based solely on the accessibility of the defendant's broadcasts within the forum, the Texas Supreme Court considered numerous general business and promotional activities that petitioners conducted in Texas. *TV Azteca*, 490 S.W.3d at 49-51. The court failed, however, to connect any of these contacts to the specific reports being

challenged in the case. *Id.* And by refusing to identify precisely which of these general business and promotional contacts made the difference in its jurisdictional analysis, the Texas Supreme Court effectively made all of them relevant.

Likewise, in affirming the exercise of personal jurisdiction in this case, the California Supreme Court relied on Bristol-Myers's general activities, such as "nationwide marketing, promotion, and distribution" of a medication and "research and development activity in California." *Bristol-Myers*, 377 P.3d at 887-88. The court relied on these contacts even though they were not related to the medication over which the plaintiffs sued.

Unfortunately, these decisions—and, specifically, their reliance on forum contacts that lack a causal nexus to the claims at issue in the cases—come at a time when broadcasters and news organizations are generating more such contacts by engaging in business ventures and promotional activities to diversify their revenue streams and build their brands. These initiatives are not tied to specific articles or reports. But they form an essential part of a broadcaster's or news organization's overall strategic plan for ensuring that its reporting operations have the necessary funding to survive in this challenging economic environment.

For example, many online publishers now operate e-commerce businesses, in addition to their publishing operations. *See* Lucia Moses, *The newest rainmaker at publishers: E-commerce editors*, DIGIDAY (April 12, 2016), https://goo.gl/4ytZQe. These e-commerce operations connect readers directly to product vendors like Amazon.com, in return for which

publishers frequently receive a commission. *See* Nick Niedzwiadek, *Vox to Join Other Media Companies in E-Commerce Push*, THE WALL STREET JOURNAL (Feb. 11, 2016, 6:00 AM), https://goo.gl/FGr80J. Other e-commerce operations by media companies focus on business-to-business technology solutions. *See* Scott Vaughan, *B2B Media Company Transformation Means More Data for Marketers*, CMO (Nov. 30, 2015), https://goo.gl/GNKXPz.

In addition to e-commerce ventures, publishers are increasingly involved in sponsoring or organizing events such as conferences, trade shows, and leadership summits. *See, e.g.*, Paula Froelich, *Can Conferences Save the Media Industry?*, DIGIDAY (Sept. 9, 2013), https://goo.gl/4M747p. These events take place across the country, often outside the state in which a publisher is based. *See, e.g.*, https://goo.gl/k7PzlP (listing conferences organized by *The Wall Street Journal*, including events in New York, California, and Washington, D.C.); *see also* https://goo.gl/S52zIH (listing conferences organized by *The Atlantic*, including events in St. Louis, Phoenix, New York, Washington, D.C., and Mountain View, California). The events are not focused on specific reporting, but on general topics and themes, functioning as an important component of a publisher's overall brand-building strategy. *See* Lucia Moses, *Inside the Atlantic's events juggernaut*, DIGIDAY, https://goo.gl/vdnVr1 (July 22, 2014) (noting that *The Atlantic* puts on more than 125 events per year).

Because these types of general business and brand-building initiatives are not connected to specific articles or reports, they should be irrelevant to the specific jurisdiction analysis in a libel suit, which fo-

cusses solely on suit-related conduct. Indeed, as the petitioners in *TV Azteca* demonstrated, such general contacts are irrelevant under the tests applied in most federal circuits and state courts of last resort. *See* Petition for a Writ of Certiorari at 23-27, *TV Azteca, S.A.B. de C.V. v. Ruiz*, No. 16-481 (filed Oct. 7, 2016). But the reliance of the California and Texas Supreme Courts on sales ties, marketing, and promotional activities unrelated to the product or reporting being challenged opens the door to a broad and unpredictable jurisdictional inquiry into other general business activities—at a time when more broadcasters and publishers are relying more heavily on them.

II. The Jurisdictional Uncertainty Created by the Decisions of the California and Texas Supreme Courts Will Chill Reporting on Matters of Public Concern.

The broad impact of the California and Texas Supreme Courts' decisions on broadcasters and the news media is problematic. These decisions and others that fail to require a rigorous causal nexus deprive publishers of the jurisdictional predictability they need to ensure that their newsgathering and reporting activities comply with the substantive legal standards in the jurisdictions where they might face suit. Although much of the law governing newsgathering and reporting has been constitutionalized, state statutes and common law standards still govern much of what broadcasters and journalists do. These state standards can vary significantly across jurisdictions, and this variation can influence how the media investigates and reports the news.

For example, state laws often determine how the news media cover allegations made in the context of

government activities and official proceedings, such as charges made in a criminal indictment or claims made in a civil lawsuit. The broadcasters and news media are generally not in a position to independently verify the truth of these allegations. Reporters might not have access to the facts that support or contradict the allegations, or those facts might not yet have been determined. Nevertheless, the fact that the allegations have been made is newsworthy.

Recognizing the critical importance of the news media's ability to report on governmental activities and official proceedings, most states have adopted some form of the "fair report" privilege. *See* RESTATEMENT (SECOND) OF TORTS § 611 (1977). Where this privilege applies, the broadcasters and news media are allowed to report allegations made by government officials and others without having to independently substantiate the allegations. *Id.* Thus, application of the "fair report" privilege means that, in a libel suit, a media defendant generally must show only that the allegation at issue was made and accurately reported, not that it is true. *Id.*

The contours of each state's "fair report" privilege vary significantly. For example, in some states, communications made by government officials acting outside the course of official proceedings—but still on matters of public concern—may not be covered by the "fair report" privilege. *See, e.g.*, *Norton v. Glenn*, 860 A.2d 48, 52 n.6 (Pa. 2004) (suggesting privilege might apply only to statements made "in the course of official proceedings"); *see also Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987) ("We conclude that unofficial statements made by police sources are outside the scope of the fair report privilege."). In other

states, allegations made in preliminary criminal proceedings or allegations that commence civil proceedings may not be covered. *See, e.g., Stone v. Banner Publ'g Corp.*, 677 F. Supp. 242, 246 (D. Vt. 1988) (privilege does not apply to articles relying on preliminary police investigation, including a police incident report); *see also Quigley v. Rosenthal*, 43 F. Supp. 2d 1163, 1178 (D. Colo. 1999) ("Colorado courts have consistently adhered to the original Restatement rule which precludes a defamation defendant from invoking the judicial proceedings privilege on the basis of a filed complaint alone."). And allegations in sealed records or in other nonpublic documents may or may not be covered, depending on the scope of the state's "fair report" privilege. *Compare Wynn v. Smith*, 16 P.3d 424, 429-30 (Nev. 2001) (per curiam) (Nevada privilege does not protect report of contents of confidential Scotland Yard report) *with Dorsey v. Nat'l Enquirer, Inc.*, 973 F.2d 1431, 1434-35 (9th Cir. 1992) (California privilege protects reports on family court proceedings where general public is excluded).

In some states, however, the protections for reporting on allegations are much broader. Texas, for example, recently passed a statute that broadly protects the news media's "accurate reporting of allegations made by a third party regarding a matter of public concern." TEX. CIV. PRAC. & REM. CODE § 73.005(b). There is no requirement that the allegations be made in public documents, or in the course of official proceedings, or have been acted on by the government. The Texas law requires only that the allegations relate to a matter of public concern and that the media accurately report them. *Id.*; *cf.* TEX. CIV. PRAC. & REM. CODE § 73.002(b) (providing separate,

narrower privilege for "fair, true, and impartial account[s]" of various official proceedings).

Even where it is clear that the "fair report" privilege or some similar protection applies, there are important state-law differences affecting how broadcasters and other publishers should report on allegations made in official proceedings, such as whether they must investigate and report additional background information or the ultimate result of the proceedings. In some states, the failure to report such information can expose a broadcaster or publisher to a libel claim. *See, e.g.*, *Fortenbaugh v. N.J. Press, Inc.*, 722 A.2d 568, 574 (N.J. Super. Ct. App. Div. 1999) ("Defendants were obligated to flesh out the report to reflect the true nature of the accusation referred to and its ultimate conclusion."). In other states, the media may, but are not required to, report such information. *See, e.g.*, *KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710, 711 (Tex. 2016) (broadcaster's reporting with and without additional information held nonactionable). And some states have held that the privilege may be defeated by the reporting of additional information outside the scope of the privilege. *See, e.g.*, *Moreno v. Crookston Times Printing Co.*, 610 N.W.2d 321, 333 (Minn. 2000).

These issues relating to whether and how the news media may report on government activities and other matters of public concern represent only a few examples of the myriad ways in which variations in state libel and privacy laws affect newsgathering and reporting. There are many others. A journalist's ability to obtain information from a confidential source may depend on state law, which may be different on opposite sides of the border. California, for

example, provides stronger protections for confidential sources than does its neighbor, Arizona. *Compare* CAL. CONST., art. I, § 2(b), *with* ARIZ. REV. STAT. ANN. § 12-2237, *and Matera v. Superior Court*, 825 P.2d 971, 973-75 (Ariz. Ct. App. 1992). Arizona, however, makes it easier for reporters to use information from audio or video recordings. *Compare* CAL. PENAL CODE § 632 (recording of calls requires consent of both parties) *with* ARIZ. REV. STAT. ANN. § 13-3005 (consent of only one party required).

If broadcasters and publishers are unable to predict where they might be sued, they will be forced to conform their newsgathering and reporting activities to the least-protective state standards. This will result in a less vigorous press, as an abundance of caution will replace the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *see N.Y. Times Co. v. Connor*, 365 F.2d 567, 571, 573 (5th Cir. 1966) (refusing to apply a minimum-contacts jurisdictional rule in a press case, citing the threat to free speech). The challenged decisions of the California Supreme Court and the Texas Supreme Court threaten just such a chilling effect.

III. Jurisdictional Standards Lacking Causal Nexus Requirements Subject Foreign Broadcasters and Publishers to Unreasonable Burdens and Expose U.S. Broadcasters and Publishers to the Reciprocal Exercise of Jurisdiction by Foreign Countries Lacking Strong Speech Protections.

In addition to jurisdictional unpredictability, decisions like those of the California and Texas Supreme Courts impose unreasonable burdens on broadcasters and publishers in the U.S. and abroad. In Texas, by eschewing *Calder*'s "focal-point" test and rejecting the majority causation approach, the Texas Supreme Court expanded the jurisdictional inquiry to include numerous contacts unrelated to the specific reporting being challenged in the case. The court cited more than a dozen different general business and promotional contacts, tacitly suggesting that all of them could be relevant in determining whether specific jurisdiction exists. *TV Azteca,* 490 S.W.3d at 50-51.

Similarly, the California Supreme Court relied on general business contacts like research and development unrelated to the medication at issue in the case and on "nationwide marketing, promotion, and distribution" of the medication. *Bristol-Myers*, 377 P.3d at 887-88. In doing so, the California Supreme Court explicitly rejected the need for a causal nexus between such contacts and the plaintiff's claims:

> [T]he more wide ranging the defendant's forum contacts, the more readily is shown a connection between the forum contacts and the claim. *Thus, [a] claim need not arise directly from the defendant's forum contacts in order to*

> *be sufficiently related to the contact to warrant the exercise of specific jurisdiction*[.]

Id. (citations and internal quotation marks omitted) (emphasis added).

This analysis improperly conflates general and specific jurisdiction, thus making it more difficult for defendants—including broadcasters and publishers—to predict where they will be sued. Moreover, this analysis also affects how jurisdictional issues are litigated. Before a court can determine whether such contacts can sustain personal jurisdiction over the defendant, the plaintiff will be given an opportunity to conduct discovery into those contacts.

Broad jurisdictional discovery imposes substantial burdens on the defendant and on the court, which must resolve any discovery disputes. As this Court recognized in *Hertz*, "[c]omplex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims. 559 U.S. at 94 (citing *Navarro Sav. Ass'n. v. Lee*, 446 U.S. 458, 464, n.13 (1980)); *see also Lozman v. City of Riviera Beach*, 133 S. Ct. 735, 745 (2013) ("[J]urisdictional tests, often applied at the outset of a case, should be 'as simple as possible.'" (quoting *Hertz*, 559 U.S. at 80)). The California and Texas Supreme Courts' analyses will result in the dramatic expansion of jurisdictional discovery in libel cases, well beyond the specific reporting being challenged, thus exposing defendants to expensive and time-consuming discovery on an increasingly wide range of commercial and promotional activities. The California Supreme Court's decision promises to have a sim-

ilar effect, both for media defendants and for corporations facing product liability suits.

Such broad jurisdictional discovery is particularly problematic for foreign broadcasters and publishers, many of whom are located in countries that do not approve of U.S.-style civil discovery. *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 115 (1987) ("Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." (citation omitted)); *see also Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 163 (2008) (noting the possibility of discovery for foreign defendants could deter business activity in the United States). Indeed, some foreign nations, such as France, have even passed "blocking statutes" designed to prohibit companies from complying with U.S. civil discovery demands. *See, e.g.*, Gary B. Born & Peter B. Rutledge, *International Civil Litigation in United States Courts*, 969-73 (5th ed. 2011). These countries require strict compliance with the Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, which has caused tension between foreign defendants and U.S. courts. *See, e.g., In re Vivendi Universal, S.A. Sec. Litig.*, No. 2-CV-5571RJHHBP, 2006 WL 3378115 (S.D.N.Y. Nov. 16, 2006) ("[I]n deciding whether discovery should proceed under the Hague Convention or the Federal Rules of Civil Procedure, 'American courts should . . . take care to demonstrate due respect for any special problem confronted by the foreign litigant on account of its nationality or the location of its operations, and for any sovereign interest expressed by a foreign state.'" (quoting *Société Nationale Industrielle*

Aérospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522, 546 (1987))). Decisions applying amorphous personal jurisdiction standards in border states like Texas and California exacerbate this tension, placing unreasonable burdens on foreign broadcasters and publishers before the issue of personal jurisdiction is even decided.[2]

As a result of these unreasonable burdens, the decisions of the California and Texas Supreme Courts also expose U.S. broadcasters and publishers to the reciprocal exercise of jurisdiction by foreign countries. *See* American Law Institute, *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute* § 5, p. 82 (2006) ("[N]on-U.S. courts . . . have often applied their domestic standards of defamation, thus raising public-policy concerns when enforcement of the foreign judgment is sought in the United States."); *cf. Japan Line, Ltd. v. Los Angeles Cty.*, 441 U.S. 434, 450 (1979) (noting the possibility that foreign governments would retaliate against chaotic state standards on an issue of international importance). The prospect of such retaliatory measures is especially troubling because most foreign countries lack the strong protections for speech and press that are guaranteed under U.S. law, including the First Amendment. *See Developments in the Law — The Law of Media: Internet Jurisdiction: A Comparative Analysis*, 120 HARV. L. REV. 1031,

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[2] The burdens associated with broad jurisdictional discovery in a foreign country or other state are also particularly problematic for individual anchors, communicators, and journalists. These individuals may lack the resources to comply with broad jurisdictional discovery requests and thus are vulnerable to attempts by plaintiffs to chill speech through meritless, yet costly, litigation.

1037 (2007) ("The contrast between U.S. free speech jurisprudence and foreign approaches that value reputation over speech reveals that the First Amendment is 'a recalcitrant outlier to a growing international understanding of what the freedom of expression entails.'" (quoting Frederick Schauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 12-13 (1980))).

Even in Commonwealth nations, with which the U.S. shares a common-law tradition, the differences in their respective libel laws are stark:

> British law "in the main loads the dice very heavily in the plaintiff's favour." Australia similarly considers defamation a strict liability tort and does not require public figures to prove actual malice. Canada's plaintiff-friendly libel laws presume damage, do not require actual malice, and place the burden on the defendant to prove the material's substantial truth.

Id. at 1037-38 (citations omitted). These differences, and the enforcement of foreign libel law against U.S. publishers, led Congress to unanimously pass the SPEECH Act in 2012. *See generally* John B. Bellinger & R. Reeves Anderson, *Tort Tourism: The Case for a Federal Law on Foreign Judgment Recognition*, 54 VA. J. INT'L L. 501, 534-35 (2014). The SPEECH Act "allow[s] American defendants to block enforcement of foreign defamation judgments that do not comply with the free speech requirements of the First Amendment." *Id.*; *see also* 28 U.S.C. §§ 4101-05 (2012).

Although the California Supreme Court's decision in this case does not directly involve concerns of international comity and reciprocity, its logic could easily cause international difficulties in future cases. The Texas Supreme Court's decision illustrates this problem in the context of a similar personal jurisdiction standard that does not require a sufficient causal nexus. Notably, the Texas Supreme Court recognized the legitimacy of international reciprocity concerns, yet it asserted that the concerns were not implicated by its decision because the *TV Azteca* petitioners had "intentionally targeted Texas[.]" *TV Azteca,* 490 S.W.3d at 56. But where "intentionally targeting Texas" consists of such general sales and promotional activities as the Texas Supreme Court cited in its decision, the court's reassurance rings hollow. Indeed, the Texas Supreme Court's decision is problematic precisely because it subjects foreign broadcasters and publishers to specific jurisdiction, even where the conduct at issue does not "intentionally target Texas."

The California Supreme Court's decision is at least equally problematic. California exercised jurisdiction over "a nonresident defendant sued by a nonresident plaintiff for injuries occurring outside the state." *Bristol-Myers*, 377 P.3d at 889. These contacts included marketing, sales revenues, relationships with distributors, research and development facilities, and persons employed by Petitioner in California. *Id.* at 889-90. Like the foreign broadcasters in *TV Azteca*, foreign media organizations and multinational corporations could easily find themselves subject to specific jurisdiction under this reasoning.

Indeed, specific jurisdiction would have an even broader reach under the California Supreme Court's

analysis than under that of *TV Azteca*, where the plaintiff lived and allegedly suffered injury in Texas. The California Supreme Court acknowledged that "the nonresident plaintiffs *have no connection to and did not suffer any [medication]-related injuries in the state.*" *Id.* at 890 (emphasis added). Because the court chose to focus on general contacts with the forum and apply a general-jurisdiction-type analysis, California's specific jurisdiction standard has become completely unmoored from the requirements of due process. A foreign defendant could be haled into court based on any promotional, marketing, research, or other activities in a particular forum, even if those contacts were not causally connected with a plaintiffs' suit.

Unless corrected, the fallout from the decisions of the California and Texas Supreme Courts will be swiftly felt by U.S. companies, broadcasters, and publishers alike.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that this Court reverse, and make clear that courts may not assert personal jurisdiction absent sufficient suit-related contacts with the forum.

Respectfully submitted.

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